

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

HAROLD L. GORDON
Claimant

VS.

OLDHAM'S FARM SAUSAGE, INC.
Respondent
Self-Insured

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Docket No. 223,537

ORDER

Respondent appeals from the preliminary hearing Order of Administrative Law Judge Bryce D. Benedict dated September 4, 1997, wherein the Administrative Law Judge granted claimant benefits in the form of medical treatment and temporary total disability compensation.

ISSUES

Respondent raises the following issue for review by the Workers Compensation Appeals Board:

- (1) Whether claimant met with personal injury by accident arising out of and in the course of his employment.

Claimant raises the following issues in his brief to the Appeals Board:

- (1) Whether the Appeals Board has jurisdiction to consider this matter.
- (2) Whether hearsay evidence can be considered by the Administrative Law Judge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board finds as follows:

The Appeals Board finds, for preliminary hearing purposes, that claimant has proven by a preponderance of the credible evidence that he suffered accidental injury arising out of and in the course of his employment.

Claimant was involved in a motorcycle accident in October, 1996 when he suffered a serious injury to his left leg. Claimant underwent surgery and had three plates inserted into his leg to help repair the various fractures suffered at the time of the accident. This motorcycle accident was not work-related.

After several months of treatment, claimant was returned to work on April 28, 1997, with the only restriction being no running or jumping. There was indication in the April 28, 1997, medical reports of Richard E. Polly, M.D., that claimant had a screw backing out of the medial malleolus at the fracture site. There was further indication of an ununited fragment interiorly.

Claimant described a work-related incident on May 15, 1997, when he stubbed his toe on a pallet, tripping, and almost falling. Claimant came down with a substantial amount of his body weight on his left leg, but immediately shifted to the other leg landing on his right knee and catching himself partially with his hands on a conveyor belt. Claimant's recovery, moments after the accident, was witnessed by an unidentified co-worker and claimant's lead man, Bill Riley. Mr. Riley asked if claimant was okay, at which time claimant acknowledged he felt he was all right. Claimant testified he did not believe he had suffered a serious injury at that time. Later that evening claimant's leg began to swell. He began to experience sensations similar to tingling or needles in his leg and the swelling worsened over several days. Claimant contacted Dr. Polly and was examined by Brett Wallace, M.D., of Dr. Polly's office on May 23, 1997. The medical reports of that date do not indicate a fall at work; however, they do describe a gradual increase in swelling over a period of approximately one week. Claimant was taken off work and additional surgery was performed to repair a broken screw in the plate and to stop the plate from going away from the bone. This indicated a non-union of the distal tibia at approximately the boot top level. The surgery involved removing the metal plate, creating an additional bone graft, and replating the injured area.

In the preliminary hearing transcript, the Administrative Law Judge expressed concern regarding the fact that Dr. Polly's and Dr. Wallace's medical opinions regarding causation came to the court by way of hearsay. Kansas Administrative Regulation 51-3-8 allows hearsay evidence to be admissible unless irrelevant or redundant. A review of the medical records clarifies the Judge's concern as the medical reports of Dr. Polly and Dr. Wallace do not discuss causation or the relationship of the work-related injury to claimant's additional problems. In fact, there is no mention of a work-related injury in their medical records. The only evidence regarding Dr. Polly's opinion that the tripping incident was unrelated to the nonunion of the fracture came by way of claimant's testimony. While the Appeals Board

acknowledges this is hearsay, it is within the Administrative Law Judge's authority to consider hearsay if he deems it appropriate.

Claimant was referred to Peter V. Bieri, M.D., for the purpose of evaluating his condition and providing an opinion regarding the causation of claimant's ongoing symptomatology. Dr. Bieri found that claimant had suffered an aggravation of a preexisting condition in the lower left extremity and possibly the left hip. He felt this injury occurred in the course of claimant's employment on or about May 15, 1997.

In Workers Compensation litigation the burden of proof is upon claimant to establish claimant's right to an award of compensation by proving various conditions upon which claimant's right depends by a preponderance of the credible evidence. See K.S.A. 44-501 and K.S.A. 44-508(g), as amended.

Dr. Bieri opined that claimant's work-related injury aggravated the claimant's preexisting fracture to his left leg. The medical reports of Dr. Polly and Dr. Wallace, silent regarding causation, do indicate a preexisting problem associated with the loose screw and a possible non-union of a portion of the fracture. However, neither Dr. Polly nor Dr. Wallace states in their reports their opinion regarding causation. The only indication in the records of Dr. Polly's or Dr. Wallace's opinions came from the testimony of the claimant which, while acceptable hearsay, is ambiguous regarding the causation of claimant's current symptomatology. The Appeals Board finds, based upon a review of the credible evidence, that claimant has proven that he suffered a work-related aggravation of his preexisting leg fracture as a result of the incident on May 15, 1997.

Claimant raised as an additional issue the question of whether the Appeals Board has the jurisdiction to review a nonfinal order. K.S.A. 44-534a, as amended, and K.S.A. 44-551, as amended, provide jurisdiction for the Appeals Board to consider, on appeal from a preliminary hearing, the issue of accidental injury arising out of and in the course of employment.

WHEREFORE, the Appeals Board finds that the Order by Administrative Law Judge Bryce D. Benedict, dated September 4, 1997, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October 1997.

BOARD MEMBER

c: Mark W. Works, Topeka, KS
Mark E. Kolich, Kansas City, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director